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In The
Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-146

BEVERLY JANE WINN,

Petitioner,

-v-

FLORIDA STATE BOARD OF NURSING,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

STEPHEN H. DAVIS
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Jacksonville, Florida 32202

and

P. DONALD DeHOFF
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SUPREME COURT OF THE UNITED STATES

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Cramp, Jr. v. Board of Public Instruction of Orange County, Fla., 1961, 368 U.S. 278, 82 S.Ct. 275, 7 L.ed 2, 285 11

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In The Supreme Court of the United States

OCTOBER TERM, 1973

No.

BEVERLY JANE WINN,

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-v-

FLORIDA STATE BOARD OF NURSING,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

COMES NOW, BEVERLY JANE WINN, and respectfully asks this Honorable Court to issue its Writ of Certiorari to review the decision of the District Court of Appeal, First District of Florida, rendered on January 23, 1973.

JURISDICTION

The Judgment of the Supreme Court of Florida denying Petition for Writ of Certiorari was entered on 24th day of

April, 1973, Petition for re-hearing filed April 30, 1973, and denied June 8, 1973. The Statutory basis for this Court's jurisdiction is 28 USC 1257(3).

STATUTE INVOLVED

(This Statute, 464.21(1)(b) F.S., because of its length, will be set out in Appendix 1).

QUESTION PRESENTED

By the statement "Immoral or unprofessional conduct" as one of the grounds for revocation of a nurse's license, and without any further statement or explanation as to what these two items consist of, is Florida Statute 464.21(1)(b) sufficiently definite to meet the minimum requirements of due process?

STATEMENT OF THE CASE

This case had its inception when the Petitioner was served with a Complaint from the Florida State Board of Nursing, alleging "Immoral *and* unprofessional" conduct, and charged inter alia:

> "As a basis for the charge of immoral and unprofessional conduct, it is alleged that on or about April and May of 1970 at Grant Haven Hospital, Jacksonville, Florida and thereafter until December 19, 1970, at various other places in Duval County, Florida, the said BEVERLY JANE WINN solicited and encouraged one SHARON LAMSON SHOAF, then a minor aged 17 years, to engage in immoral acts contrary to the Statutes of the State of Florida." (App. 2)

After a hearing before the full Board on June 13, 1973, an Order was entered suspending the license of the Petitioner as a registered nurse for a period of two (2) years. (App. 3)

The only recourse for judicial review open to an aggrieved person as a result of orders of any regulatory board is Florida Statute 120.31. The Statute, because of its length, will be reproduced in the Appendix (No. 4)

The Petitioner for Writ of Certiorari in the District Court, (App. 5) raised various points including the one of being overbroad and violation of due process of law, but was denied by the District Court of Florida, First District, on January 23, 1973. (App. 6) Petition for Re-hearing (App. 7) was denied on February 27, 1973. (App. 8) Petitioner then went to the discretionary remedies provided under the Florida Rules of Appellate Procedure, filing a Petition for Certiorari in the Supreme Court of the State. (App. 9) The Petition was denied on April 24, 1973, (App. 10) on the basis that: "It appearing unto the Court that it is without jurisdiction . . . ". Petition for re-hearing was filed on April 30, 1973, (App. 11) and denied on June 8, 1973. (App. 12) On June 11, 1973, Petition was filed in the Supreme Court of Florida for a Stay pending filing of a Petition for Certiorari to this Court. (App. 13) Said Court granted ten (10) days Stay; up to and including June 25, 1973. (App. 14)

REASONS FOR GRANTING OF WRIT

The charges against Petitioner herein were based entirely on Florida Statute 464.21(1)(b), which states a general charge of "immoral or unprofessional conduct.' There is no further requirement of the statute evidencing what acts or

conduct are to be defined as immoral or unprofessional. It is the belief, therefore, of the Petitioner that the statute does not place her upon sufficient notice as to just what acts or conduct are proscribed by the statute.

The Complaint of the Florida State Board of Nursing which is set forth in the Appendix (2), is so vague and indefinite as to have made it impossible to prepare and present before the Board a proper defense thereto.

It is stated in *Lanzetta, et al. v. State of New Jersey,* 1939, 306 US 451, 59 S.Ct. 618, 83 L.ed. 888, as follows:

> "If on its face the challenged provision is repugnant to the due process clause, *specification of details of the offense intended to be charged would not serve to validate it.* Cf. United States v. Reese, 92 U.S. 214, 221, 23 L.ed. 563; Czarra v. Board of Medical Supervisors, 25 App.D.C. 443. *It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression.* See Stromberg v. California, 283 U.S. 359,368, 51 S.Ct. 532, 535, 75 L.Ed. 1117, 73 A.L.R. 1484; Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.ed. 949. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in Connally v. General Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.ed. 322:
>
> 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair

> play and the settled rules of law; and a statute which either forbids or required the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'" (Underscoring Supplied)

Under the case law, as set forth, it is the statute that counts. The term "immoral and unprofessional" conduct not only varies in various parts of the state, but also in various parts of the country. Its meaning in one portion of the state may be quite different from its meaning in another part. The statute in question may not be validated by mere specification and charges thereunder of details of the offense intending to be charged. .

There is no guideline in Florida or any standard set up to let the public or the holders of nursing licenses know exactly what conduct is prohibited. It is thus possible for the Nursing Board to employ such standards with no advance notice, as may meet their personal views. There is nothing whatever within the statute itself or in the few cases directly in point to prevent arbitrary and discriminatory enforcement. It is the position of the Petitioner that the statute is so vague, uncertain and indefinite as to render it clearly violative of Petitioner's 14th Amendment right to due process of law. It is the further position of the Petitioner that any statute whose language is so vague and indefinite that either a man or woman of common intelligence could not determine in advance whether or not any particular act or conduct would collide with the statute must fall under the 14th Amendment as being overbroad and indefinite.

One of the leading cases along this line was *Papachristou v. City of Jax*, 1972, 405 U.S. 156, 92 S.Ct. 839, 31 L.ed.2,

110, in which eight defendants were convicted in the Jacksonville, Florida municipal court of violating the Jacksonville vagrancy ordinance which levied criminal penalties on 15 different types of violations. On Certiorari to the United States Supreme Court, judgment was reversed. It was held that the Jacksonville ordinance was void for vagueness both in the sense that it failed to give a person of ordinary intelligence fair notice that his contemplated conduct was forbidden by ordinance and because it encourages arbitrary and erratic arrests and convictions.

In *Smith v. Florida*, 1972, 405 U.S. 172, 92 S.Ct. 848, 31 L.Ed.2 122, the Florida vagrancy statute 856.02 F.S.A. includes in the term "vagrants" who can be criminally charged and convicted, "persons wondering or strolling around from place to place without any lawful purpose or object." The Supreme Court stated: "We therefore vacate and remand the judgment in the instant case for reconsideration in light of Papachristou." (supra)

In *Rabe v. Washington*, 1972, 405 U.S. 313, 92 S.Ct. 993, 31 L.Ed. 2d 258, it is stated:

> "To avoid the constitutional vice of vagueness, it is necessary, at a minimum, that a statute give fair notice that certain conduct is proscribed. The statute under which petition was prosecuted, however, made no mention that the "context" or location of the exhibition was as element of the offense somehow modifying the word "obscene." Petitioner's convictions was thus affirmed under a statute with a meaning quite different from the one he was charged with violating.
>
> "We hold simply that a state may not criminally punish the exhibition at a drive-in theatre of a motion

> picture where the statute, used to support the conviction, has not given fair notice that the location of the exhibition was a vital element of the offense."

In *Gooding v. Wilson*, 1972, 405 U.S. 518, 31 L.Ed.2 408, 92 S.Ct. 1103, a habeas corpus proceeding by a state prisoner to set aside his conviction under a Georgia statute on the grounds that the statute was unconstitutional, the United States Supreme Court held that the Georgia statute which provided that "any person who shall, without provocation, use to or of another, and in his presence . . . approbrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor and which had not been narrowed by the Georgia courts to apply only to "fighting words" which by their very utterance . . . tend to incite an immediate breach of the peace, was on its face unconstitutionally vague and overbroad." The Court further stated: "Accordingly, we agree with the conclusion of the District Court, *"(t)he fault of the statute is that it leaves wide open the standard of responsibility so that it is easily susceptible to improper application.*" And also: "Rather, that broad standard effectively *'licenses the jury to create its own standard in each case.'*" (Underscoring supplied)

In *Interstate Circuit, Inc. v. City of Dallas*, 1968, 390 U.S. 676, 88 S.Ct. 1298, 20 L.ed 2, 620, the Court held that an ordinance providing for classification of films as suitable for young persons or not suitable for young persons, and in defining unsuitable class, using standards dependent upon understanding of individual censors, was invalid for want of narrowly drawn reasonable and definite standards, and stated in part:

> "The vice of vagueness is particularly pronounced where expression is sought to be subjected to licensing . . .

of course, as the Court said in Joseph Burstyn, Inc. v. Wilson, 343 U.S. at 502, 72 S.Ct. at 781, '(i)t does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places.' What does follow at the least, as the cases above illustrate, is that the restrictions imposed cannot be so vague as to set 'the censor . . . . adrift upon a boundless sea . . .' id., at 504, 72 S.Ct. at 782. In short, as Justice Frankfurter said, 'legislation must not be so vague, the language so loose, as to leave to those who have to apply it too wide a discretion . . .' Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. at 694, 79 S.Ct. at 1368, (concurring in result), one reason being that 'where licensing is rested, in the first instance, in an administrative agency, the available judicial review is in effect rendered inoperative (by vagueness),' Joseph Burstyn, Inc. v. Wilson, supra, 343 U.S. at 532, 72 S.Ct. at 796 (concurring opinion). Thus, to the extent that vague standards do not sufficiently guide the censor, the problem is not cured merely by affording de novo judicial review. Vague standards, unless narrowed by interpretation, encourage erractic administration whether the censor be administrative or judicial; 'individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than the regulation by law,' Kingsley Int'l Pictures Corp. v. Regents, supra, 360 U. S. at 701, 79 S.Ct. at 1372 (Clark, J., concurring in result)"

In *Palmer v. City of Euclid, Ohio,* 1971, 402 U.S. 544, 91 S.Ct. 1563, 29 L.ed. 2, 214, the Appellant Palmer was convicted by a jury of violating the City of Euclid's "suspicious person ordinance" that is,

> "Any person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself."

The Supreme Court of the United States said:

> "We reverse the judgment against Palmer because the ordinance is so vague and lacking in ascertainable standards of guilt that, as applied to Palmer, it failed to give 'a person of ordinary intelligence fair notice that his contemplated conduct is forbidden . . .' United States v. Harriss, 347 U.S. 612, 617 (1954)'

In *Coates, et al v. City of Cincinnati*, 1971, 402 U.S. 611, 91 S.Ct. 1686, 29 L.ed 2, 98, a Cincinnati, Ohio, ordinance makes it a criminal offense for "three or more persons to assemble . . . on any of the seidwalks . . . and there conduct themselves in a manner annoying to persons passing by . . ." The issue before us is whether this ordinance is unconstitutional on its face. The court said:

> "We are thus relegated, at best, to the words of the ordinance itself. If three or more people meet together on a sidewalk or street corner, they must conduct themselves so as not to annoy any police officer or other persons who should happen to pass by. In our opinion this ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.
>
> "Conduct that annoys some people does not annoy others. Thus, the ordinance is vague not in the sense

that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning.'" Connally v. General Construction Co., 269 U.S. 385, 391."

* * *

GIACCIO v. STATE OF PENNSYLVANIA

(1966) 382 U.S. 399, 86 S.Ct. 518, 15 L.ed. 2, 447

Defendant was acquitted of wantonly pointing and discharging firearm but was sentenced to pay costs of prosecution. Supreme Court, Mr. Justice Black, held that the Pennsylvania statute authorizing the jury to impose cost of criminal prosecution on defendant acquitted of a misdemeanor charge is in violation of due process because of vagueness and absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory imposition of costs. The Court in its opinion, said:

"It would be difficult, if not impossible, for a person to prepare a defense against such general abstract charges as "misconduct," or "reprehensible conduct." If used in a *statute* which imposed forfeitures, punishments or judgments for costs, such loose and unlimiting terms would certainly cause the statute to fail to measure up to the requirements of the Due Process Clause. And these terms are no more effective to make a statute valid which standing alone is void for vagueness."

CRAMP, JR. v. BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLA.

(1961) 368 U.S. 278, 82 S.Ct. 275, 7 L.ed. 2, 285

This was an action by a schoolteacher challenging the constitutionality of the loyalty oath required by the statute of the State of Florida; this Court held that a Florida state statute requiring each employee of state to execute oath that he had never lent his aid, support, advice, counsel or influence to Communist Party, at risk of subsequent prosecution for perjury or face immediate dismissal from public service, was unconstitutionally vague and constituted a denial of due process of law, and in so holding stated in part:

> "We think this case demonstrably falls within the compass of those decisions of the Court which hold that " * * * a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Lanzetta v. State of New Jersey, 306 U.S. 451, 453, 50 S.Ct. 618, 619, 83 L.Ed. 888." "Words which are vague and fluid * * * may be as much of a trap for the innocent as the ancient laws of Caligula." United States v. Cardiff, 344 U.S. 174, 176, 73 S.Ct. 189, 190, 97 L.Ed. 200. "In the light of our decisions, it appears upon a mere inspections that these general words and phrases are so vague and indefinite that any penalty prescribed for

their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." Champlin Refining Co. v. Corporation Commission of Oklahoma, 286, U.S. 210, 243, 52 S.Ct. 559, 568, 76 L.Ed. 1062.

CASES CITED BY THE SUPREME COURT OF FLORIDA

Locklin v. Pridgeon, 158 Fla., 737, 30 So.2 102 – Petitioner in habeas corpus showed he was indicted for an alleged violation of Chapter 22671, Acts of 1945, which were brought forward as section 839.22, 1946 Cumulative Supplement to F.S. 1941. The Aot provided "that it shall be unlawful for any person to commit any act under color of authority as an officer agent or employee of the U. S. Government, State of Florida, or any political subdivision thereof when such *act is not authorized by law;* or to intimidate or otherwise by color of authority cause any other person to release information or allow inspection of records by extending privileges not required by law." (Emphasis supplied by Court)

The Florida Supreme Court held that the infirmative of the statute was that it was too vague, indefinite and uncertain to constitute notice of crime or crimes or unlawful acts which it purports to prohibit. The Statute describes no ascertainable standard of guilt. The Court said: "If the statute leaves it to a ministerial officer to determine the thing to which the statute is to be applied, and if the definition is not commonly known as the modes already pointed out, th act becomes invalid, because it creates an unwarranted and void delegation of legislative power." The Court further states: "When the terms of the statute are so uncertain as

to their meaning that the Court cannot say with reasonable certainty what is intended, it will pronounce the enactment void." Further quoting: "A statute which requires the doing of an act so indefinitely described that man must guess at its meaning violates due process of law" . . . . . "A statute, especially a penal statute must be definite to be valid."

In *Franklin v. State and Joyce v. State*, Fla., 257 So.2 21 – The Statute on which these two were convicted reads as follows: "Whoever commits the abominable and detestable crime against nature, either with mankind or with beast, shall be punished by imprisonment in the state prison not exceeding 20 years."

The Court said: "Very serious question is raised as to whether the statute meets the recognized constitutional test that it inform the average person of common intelligence as to what is prohibited so that he need not speculate as to the statutory meaning. If the language does not meet this test then it must fall and the matter must be left to legislative correction. This statute and others relating to a variety of sex offenses need immediate legislative review and action." The Court also held: "Further reasoning dictating our re-examination here is expansion of constitutional rulings on the invasion of private rights by state intrusion which must be taken into account and consideration of the statute's continuing validity." Further, "it is authoritatively recognized that this statute provides a penalty for a crime, but *fails to deliniate (sic) what conduct will violate its terms.*" (Emphasis added by court)

State v. Barquet, Fla., 262 So.2 431 – Defendants were charged with violating the abortion statute in the criminal court of record in Dade County, which declared the statute unconstitutional, the state appealed. The Supreme Court

held that the abortion statute prohibited abortions except "those necessary to preserve the life of such mother" was unconstitutionally vague. The Court held in part: "If a statute, in defining a criminal offense, omits certain necessary and essential provisions which serve to impress the acts committed as being wrongful and criminal, the courts cannot supply the deficiencies or undertake to make the statute definite and certain because to do so would be to perform a lawmaking function; the public must be informed as to acts which are crimes by statute, rather than by judicial opinion." Art. 2, Section 3. The Court further pointed out that to recognize the constitutional test, it must inform the average person of common intelligence as to what is prohibited so that they may not speculate as to the statutory meaning.

CONCLUSION

The Petitioner submits that the importance of reviewing this case by this Court goes far beyond the individual involved.

The Regulatory Boards of the State of Florida operate without any guidelines, either legislatively or judicially imposed.

They are responsible to no one and well within the proscriptions oft expressed by this Court against allowing unlimited discretion to a ministerial board without guidelines to be followed when they exercise them.

The Petitioner submits that the question here involved is substantial and worthy of a review by this Court.

Respectfully submitted,

STEPHEN H. DAVIS
802 Barnett Bank Building
Jacksonville, Florida 32202
Attorney for Petitioner

P. DONALD DeHOFF
and 802 Barnett Bank Building
Jacksonville, Florida 32202
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing Petition for Writ of Certiorari and appendices has been furnished The Supreme Court of Florida, Tallahassee, Florida, Florida District Court of Appeal, First District, Tallahassee, Florida, and to Julius L. Finegold, Esquire, Seaboard Coast Line Building, Jacksonville, Florida, attorney for Florida State Board of Nursing, by United States Mail, this ..... day of July, 1973.

.....

Attorney

"APPENDIX 1"

"Volume 15(a) F.S.A. page 283 et seq."

464.21 Disciplinary proceedings

(1) Grounds for discipline. – The board shall have the authority to deny a license to any applicant, or discipline the holder of a license or other authority to practice nursing in the state, whose default has been entered or who has been heard and found guilty by the board of any of the following:

(a) Fraud in the practice of nursing, or is guilty of fraud or deceit in the procuring or attempting to procure a license to practice nursing as a registered professional nurse or as a licensed practical nurse;

(b) Immoral or unprofessional conduct;

(c) Habitual intemperance or addiction to the use of narcotics or other habit-forming drugs;

(d) Circulating untrue, fraudulent, misleading or deceptive advertising;

(e) Unfitness or incompetency;

(f) Wilfully or repeatedly violating any of the provisions of this chapter or laws of this state involving moral turpitude;

(g) Conviction of a felony in the courts of this or any other state, territory or country. Conviction of any offense in another state, territory or country which, if committed in this state, would

"APPENDIX 2"

"EXCERPT FROM BOARD'S COMPLAINT"

BEFORE THE FLORIDA STATE BOARD OF NURSING

IN THE MATTER OF:

BEVERLY JANE WINN
231 West Eleventh Street
Apartment A
Jacksonville, Florida CASE NO. 71-13

As a Registered Nurse
License No. R.N. 20670

COMPLAINT AND NOTICE OF HEARING

COMES NOW the FLORIDA STATE BOARD OF NURSING, by and through its undersigned counsel, and brings this its Complaint against BEVERLY JANE WINN alleging that the License R.N. No. 20670, previously issued to BEVERLY JANE WINN, should be suspended, revoked or disciplinary action taken as provided by Florida Statutes, Chapter 464.21, because the said BEVERLY JANE WINN is guilty of immoral and unprofessional conduct within the meaning of Florida Statutes, 464.21(1)(b), and as a basis for this, its Complaint, alleges as follows:

1. The undersigned attorney is the attorney of record for the Florida State Board of Nursing and files this Complaint under the discretion and on behalf of the Florida State Board of Nursing.

2. Sworn charges have been filed against the said BEVERLY JANE WINN, pursuant to Florida Statutes, Chapter 464.21(4) (a).

3. As a basis for the charge of immoral and unprofessional conduct, it is alleged that on or about April and May of 1970 at Grant Haven Hospital, Jacksonville, Florida, and thereafter until December 19, 1970 at various other places in Duval County, Florida, the said BEVERLY JANE WINN solicited and encouraged one Sharon Lamson Shoaf, then a minor aged 17 years, to engage in immoral acts contrary to the Statutes of the State of Florida.

4. At the said times and places aforesaid, the said BEVERLY JANE WINN knew that the said Sharon Lamson Shoaf was admitted to Grant Haven Hospital for reasons of emotional instability.

5. During the said period of time the said BEVERLY JANE WINN administered and/or procured for the said Sharon Lamson Shoaf various prescriptions drugs, including but not limited to Thorazine and Dilantin, knowing that the said drugs had not been prescribed by Sharon Lamson Shoaf's physician.

NOW, THEREFORE, PLEASE BE ADVISED THAT FORMAL HEARING WILL BE HELD UPON THIS COMPLAINT BEFORE THE FLORIDA STATE BOARD OF NURSING OR ITS DULY AUTHORIZED HEARING OFFICER AT 9:00 O'CLOCK A.M. ON THURSDAY, SEPTEMBER 2, 1971, OR AS SOON THEREAFTER AS THIS MATTER MAY BE HEARD, AT THE BOARD'S EXECUTIVE OFFICES LOCATED AT 4415 BEACH BOULEVARD, JACKSONVILLE, DUVAL COUNTY, FLORIDA.

This formal hearing will be held pursuant to Florida Statutes, Chapter 464.21, and Rules and Regulations of the Florida State Board of Nursing, 21 0-5.01 through 21 0-5.23. A copy of the said Rules and Regulations is enclosed herewith, and you are advised to read them very carefully as to fully

apprise you of your rights, and you are particularly cautioned to read Board Rule 21 05.05, which provides that you must answer this Complaint within ten (10) days after it is served on you.

Respectfully submitted this the 6th day of August, 1971.

UNDER THE AUTHORITY AND
DIRECTION OF THE FLORIDA
STATE BOARD OF NURSING

BY: S/ Albert S. C. Millar, Jr.
ALBERT S. C. MILLAR, JR.
1241 King Street
Jacksonville, Florida

"APPENDIX 3"

"ORDER OF THE BOARD"

IN THE MATTER OF:

BEVERLY JANE WINN
231 West Eleventh Street
Apartment A
Jacksonville, Florida — CASE NO. 71-13

As a Registered Nurse
License No. R.N. 20670

ORDER OF THE BOARD

The above entitled cause came on to be heard on the 4th day of November, 1971 in the executive offices of the Florida State Board of Nursing, 4415 Beach Boulevard, Jacksonville, Florida, and it appeared to said Board that the Re-

spondent Beverly Jane Winn, did receive due notice of hearing, and was represented by counsel Stephen H. Davis and P. Donald DeHoff, Jacksonville, Florida.

Based upon the Findings of the duly authorized Hearing Officer, Margaret E. Boyd, R.N. and the Board having reviewed the Complaint filed against the Respondent, testimony taken before the Hearing Officer, deposition of Sullivan G. Bedell, M.D. and Briefs filed by attorneys for the Respondent and the Board, having heard the oral argument by the Respondent's attorneys, Stephen H. Davis and P. Donald DeHoff on June 12, 1972, and the Board being fully advised in the premises, the Board concludes that the Respondent, Beverly Jane Winn is guilty of unprofessional and immoral conduct.

It is therefore ordered that the registered nurse license #20670 of the Respondent, Beverly Jane Winn, be suspended for a period of two (2) years.

That the Respondent either after one (1) year of suspension or upon termination of the specified period (two (2) years) may petition the Board to appear for a hearing to show cause why her license should be reinstated.

DONE AND ORDERED this 13th day of June, 1972.

FLORIDA STATE BOARD OF NURSING

.....

Hazel M. Peeples, R.N.
Secretary-Treasurer

BOARD SEAL

ccs: Albert S. C. Millar, Jr.
Stephen H. Davis
and
P. Donald DeHoff
Attorney

"APPENDIX 4"

120.31 Review of agency orders

(1) As an alternative procedure for judicial review, and except where appellate review is now made directly by the supreme court, the final orders of an agency entered in any agency proceeding, or in the exercise of any judicial or quasi-judicial authority, shall be reviewable by certiorari by the district courts of appeal with the time and manner prescribed by the Florida appellate rules. If judicial review is sought under this section, the petition shall so state. The venue of the proceedings for such review shall be the appellate district which includes the county wherein hearings before the hearing officer or agency, as the case may be, are conducted, or if venue cannot be thus determined, then the appellate district wherein the agency's executive offices are located.

(2) In cases where certiorari is granted pursuant to this section, the court may issue its mandate, or order, with directions to the agency to enter such order in the proceedings as is appropriate on the record, or the court may remand the cause for such further proceedings, including the taking of testimony, as may to the court seem necessary or proper:

(a) To accord the parties due process of law;

(b) To establish a sufficient record, for review;

(c) To accord the parties their constitutional, statutory or procedural rights; and

(d) To accomplish the purposes and objectives of the law pursuant to which the administrative proceeding was initiated.

(3) When supersedeas is not otherwise provided for, any such ruling or order of an agency, may in appropriate cases, be superseded upon an application for supersedeas showing good cause therefor, made to the agency, or the court. If the

order has the effect of suspending or revoking a license, supersedeas shall be granted, as of right, upon such conditions as shall be reasonable, and in any event the order granting supersedeas shall specify the conditions upon which supersedeas is granted.

(4) When appropriate, a party may attack an adverse order by mandamus, prohibition or injunction, and costs shall be assessed as provided in other civil actions.

"APPENDIX 5"

"PETITION FOR WRIT OF CERTIORARI TO DISTRICT COURT"

IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT OF FLORIDA

BEVERLY JANE WINN,
Petitioner,

vs.

FLORIDA STATE BOARD OF NURSING,
Respondent.

TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA:

Petitioner, BEVERLY JANE WINN, presents this her Petition for Writ of Certiorari and states:

1. Petitioner seeks to have reviewed an Order of the Florida State Board of Nursing, dated the 13th day of June, 1972, in which her registered nurse license was suspended for a period of two years.

2. This Petition is presented under and pursuant to Article 5, Section 4, of the Florida Constitution, and Rule 4.5c of the Florida Appellate Rules.

3. This Petition is accompanied by a certified transcript of the record of the proceedings, including the Order Petitioner seeks to have reviewed, and a supporting brief.

4. The following are the facts of the case:

(a) Based upon the sworn charges of Sharon Lamson Shoaf, the Florida State Board of Nursing filed a complaint alleging that the said Petitioner was guilty of "immoral and unprofessional conduct," in that during certain dates the said Petitioner solicited and encouraged Sharon Lamson Shoaf, a minor, 17 years of age, to engage in immoral acts contrary to the statutes of the state of Florida. (A1).

(b) It was alleged that during the said period of time the said Petitioner administered and/or procured for the said Sharon Lamson Shoaf various prescription drugs, including but not limited to Thorazine and Dilantin, knowing that the same had not been prescribed by Sharon Lamson Shoaf's physician. (A1).

(c) Subsequently, Answer was filed admitting the owner of the nurses's license and denying the other allegations. (A2).

(d) On September 10, 1971, Petitioner filed a Motion in the form of Interrogatories. (A3).

(e) Another Motion was filed by the Petitioner on September 28, 1971, asking for copy of said sworn charges. (A5).

(f) Said Motion of September 10, 1971, was denied. (A6).

(g) Petitioner's Motion was filed on September 28, 1971, asking for a more definite statement of facts underlying the charges pressed against her. (A6).

(h) The Board, on September 23, 1971, denied the Motion of September 10, 1971. (A6).

(i) Order was filed on October 11, 1971, by the Board denying both Motions dated September 28, 1971. (A6).

(j) The Petitioner's attorneys were never furnished with a copy of said sworn charges and the only time they did see them was in the middle of cross-examination of said Sharon Lamson Shoaf, when there was a ten-minute break and Petitioner's attorneys were allowed to read the said charges. Charges were never introduced into evidence.

(k) The Board's reason for not furnishing copy of said charges was that they were "privileged."

(l) Despite the fact that the information sought by the Petitioner's attorneys regarding the information upon which the Complaint was based was never furnished and they were forced to go to trial and at the conclusion of the testimony for the said Board, Petitioner's attorneys made both oral and written Motion for a Recess or Continuance, which was denied. Said Motion is on page 255 of the transcript and the denial is on page 257 of the transcript.

(m) On March 31, 1972, the Board's Hearing Officer made her report of "Findings of Fact" and also her "Conclu-

sions of Law and Recommendations" (A8 and 11). Thereafter, the Petitioner filed her Exceptions to the Hearing Officer's Recommendations. (A 12). Subsequently, Petitioner's attorneys appeared before the entire Board and argued the matter.

(n) On June 13, 1972, th Board entered its Order which is the one appealed from. (A 17).

5. On the foregoing facts, the Court was presented with the following points of law:

(a) Are the sworn charges filed before the Board of Nursing "privileged" to the extent that a Respondent cannot obtain copies of same?

(b) The Board held "yes" despite the rulings of the Courts in the following cases: *Caswell v. Manhattan,* 399 Fed. 2d 417, CCA 5th, page 3; *Shell v. State Road Dept.,* (Fla.) 135 So. 2d 857, page 4; *Herold v. Computer Components International* (Fla.) 252 So. 2d 576, page 4; *State v. Dewell,* (Fla.) 167 So. 687, page 5; *United States v. Krulewitch,* 145 F(2d) 76 CCA2, page 6, *State of Washington ex rel. Haughland v. Hon. Ralph Smythe,* 169 P2d 706, page 7; *Fleming v. Enterprise Box Co.,* 36 Fed. Supp. 606 SD Fla., page 7; *Roviaro v. United States,* 77 S. Ct. 623, 363 U. S. 60, 1. L. Ed. (2) 639, page 8.

(c) Was the Petitioner entitled to be furnished with a more definite statement of facts underlying the charges against her and should said Board furnish her with same? The Board held "no."

(d) This is in the face of the Ruling in *Powell v. Board of Public Inst. of Levy County,* 229 So. 2d 308, page 10; *State ex rel. Jordan v. Pattishal, et al,* 126 So. 147, page 11; and *Lowell v. State of Fla.,* 253 So. 2d 448, page 11.

(e) In view of the facts of this case and despite numerous requests for copies of sworn charges, they were never furnished the Petitioner. Was not the Board in error in not granting Motion for Continuance? The Board said "no," which was contrary to the case of Powell, supra, and *Floyd v. State of Florida*, 90 So. 2d 105, page 13.

(f) Is the Statute which merely states "immoral and unprofessional conduct" so vague and ambiguous that it violates due process of law; the Board held "no." This is in face of *Claude Smith v. State of Florida*, 252 So. 2d 465, page 15; *Franklin v. State*, 257 So. 2d 21, page 16; *In re: Fuller*, 255 So. 2d 1, page 19; and *Gooding v. Wilson*, 92 S. Ct. 1103, page 19.

(g) In view of all the testimony relating to alleged acts which took place one year before, was this sufficient to hold the Petitioner guilty of the charges alleged against her – the Board held "yes." This in view of the Court ruling in *State v. Junkin*, (Fla.) 89 So. 2d 481, page 20.

(h) The Petitioner did not testify at the hearing; yet the Hearing Officer made the following finding: "The Respondent did not elect to testify"; was this not in violation of ruling 1.250 Florida Rules of Civil Procedure, and constituted reversible error? Petitioner says "yes."

(i) Was the Board conducted in a fair and impartial manner when the Board's attorney acted as advisor prosecutor and examiner of witnesses appearing before the Board; the Board held "yes," which seemed to conflict with *Metropolitan Dade County v. Florida Processing Company*, 3rd District, 218 So. 2d 495, page 21.

5. The Order and decision of the Florida State Board of Nursing which Petitioner seeks to have reviewed is in direct

conflict with both Florida and other states, including Federal and United States Supreme Court authorities. Because of the reasons and authorities set forth in Petitioner's Brief, it is believed that the Order or decree hereby sought to be reviewed is erroneous and that the authorities cited by Petitioner are correct and should be approved by this Court as the controlling law for the State of Florida.

WHEREFORE, Petitioner requests this Court to grant a Writ of Certiorari and enter its Order quashing the order or decree hereby sought to be reviewed and granting such other and further relief as shall seem right and proper to the Court.

STEPHEN H. DAVIS and
P. DONALD DeHOFF

By .....

Attorneys for Petitioner
802 Barnett Bank Building
Jacksonville, Florida 32202

"APPENDIX 6"

"DISTRICT COURT'S DENIAL OF PETITION FOR CERTIORARI"

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JANUARY TERM, A. D. 1973

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND DISPOSITION THEREOF IF FILED.

CASE NO. R-367

BEVERLY JANE WINN,
Petitioner,

-vs-

FLORIDA STATE BOARD OF NURSING,
Respondent.

Opinion filed January 23, 1973.

Petition for Writ of Certiorari – Original Jurisdiction.
Stephen H. Davis and P. Donald DeHoff, for Petitioner.
Albert S.C. Millar, Jr., for Respondent.

PER CURIAM.

Petition for Writ of Certiorari denied.

SPECTOR, CHIEF JUDGE, RAWLS and JOHNSON, JJ., CONCUR.

"APPENDIX 7"

"PETITION FOR RE-HEARING IN DISTRICT COURT"

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

Case No. R-367

BEVERLY JANE WINN,
Petitioner,

-vs-

FLORIDA STATE BOARD OF NURSING,
Respondent.

PETITION FOR RE-HEARING

The Petitioner, BEVERLY JANE WINN, by and through her undersigned attorneys, files this her Motion for Re-Hearing of the Court's opinion filed January 23, 1973, and for grounds for same, says:

1. The Florida Board of Nursing charged the Petitioner with being guilty of "immoral and unprofessional conduct" based on section 464.21 (1) (b) F.S. and alleged as a basis for the charge of immoral and unprofessional conduct "that on or about April and May of 1970, at Grant Haven Hospital, Jacksonville, Florida, and thereafter until December 19, 1970, at various other places in Duval County, Florida, the said BEVERLY JANE WINN, solicited and encouraged one Sharon Lamson Shoaf, then a minor aged 17 years, to engage in immoral acts contrary to the Statutes of the State of Florida," and found her guilty of "unprofessional and immoral conduct."

2. Said statute being penal in nature is unconstitutional by being vague and indefinite and overbroad, and the allegations are not set forth in language which is relevant to today's society so that men of common intelligence must necessarily guess as to its meaning and differ as to its application and leaving up to the individual hearing authorities their own interpretation. We believe that our said grounds for re-hearing comes within the law as laid down by the Florida Supreme Court in the cases of *Locklin v. Pridgeon* 30 So.2 102; *Franklin v. State* and *Joyce v. State*, 257 So.2 21; *State of Florida v. Barquet* 262 So.2 431 (abortion statute); *United States Supreme Court* case *Pappachristou v. City of Jacksonville* ..... U. S. ..... 31 L.ed. 2 110, 92 Sup. Ct. .....; and *Gooding v. Wilson*, 92 S.Ct. 1103 (1972) 405 U. S. 518; 31 L.ed. (2) 408, 40 Law Week 4329.

3. We believe that the Court through oversight failed to consider the constitutionality of said cases in relation to the said charges and findings in the instant case, based on Section 464.21 (1) (b), F.S.

Respectfully submitted,

STEPHEN H. DAVIS and
P. DONALD DeHOFF

By: /s/ P. DONALD DeHOFF
Attorneys for Petitioner
802 Barnett Bank Building
Jacksonville, Florida 32202

I HEREBY CERTIFY that copy of the foregoing Petition for Re-Hearing has been furnished Albert S. C. Millar, Jr., Attorney for Florida State Board of Nursing, 1233 King St., Jacksonville, Florida, by United States mail, this 5th day of February, 1973.

/s/ P. DONALD DeHOFF
Attorney

"APPENDIX 8"

"DENIAL OF PETITION FOR RE-HEARING IN THE DISTRICT COURT"

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JANUARY TERM, A. D. 1973

CASE NO. R-397

BEVERLY JANE WINN,
Petitioner,

-vs-

FLORIDA STATE BOARD OF NURSING,
Respondent.

ORDER

Petition for Rehearing having been considered,

IT IS ORDERED that the petition is hereby denied.

WITNESS the Honorable Sam Spector, Chief Judge, and Seal of the Court this 27th day of February, A. D. 1973.

/s/ RAYMOND E. RHODES
Clerk

A True Copy
ATTEST:

/s/ RAYMOND E. RHODES
Clerk, First District Court of Appeal
Tallahassee, Florida

"APPENDIX 9"

"PETITION FOR CERTIORARI IN FLORIDA SUPREME COURT"

IN THE SUPREME COURT OF FLORIDA

BEVERLY JANE WINN,

Petitioner,

-vs-

FLORIDA STATE BOARD OF NURSING,

Respondent,

PETITION FOR CERTIORARI TO THE DISTRICT COURT OF APPEALS, FIRST DISTRICT

STEPHEN H. DAVIS and
P. DONALD DeHOFF
Attorneys for Petitioner
802 Barnett Bank Building
Jacksonville, Florida 32202

IN THE SUPREME COURT OF FLORIDA

BEVERLY JANE WINN,

Petitioner,

-vs-

FLORIDA STATE BOARD OF NURSING,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT

TO THE SUPREME COURT OF THE STATE OF FLORIDA:

Petitioner, BEVERLY JANE WINN, presents this her Petition for Writ of Certiorari, and states:

1. Petitioner seeks to have reviewed opinion of the District Court of Appeals, First District of Florida, dated January 23, 1973, and filed in the records of the said District Court on the 23rd day of January, 1973, in Minute Book ....., page .....

2. This Petition is presented under and pursuant to Article 5 Section 4 of the Florida Constitution and rule 4.5(c)(6) of Florida Appellate Rules.

3. This Petition is accompanied by conformed copies of transcript of record of the proceedings including the opinion the Petitioner seeks to have reviewed, and a supporting Brief.

4. Herein, "A" refers to records of pleadings and also reported cases.

5. Unless otherwise noted, underscoring is supplied.

6. The following are the facts of the case:

On August 6, 1971, the Florida State Board of Nursing filed a Complaint against the Petitioner herein alleging that she was a licensed registered nurse and asked for the suspension, revocation or disciplinary action as provided by Florida Statute Chapter 464.21 because the said BEVERLY JANE WINN was guilty of immoral and unprofessional conduct within the meaning of the Florida Statutes 464.21(1)(b), based on sworn charges filed against BEVERLY JANE WINN alleging charge of immoral and unprofessional conduct; said Complaint alleged that on or about April and May, 1970, at Grant Haven Hospital, Jacksonville, Florida, and thereafter until December 19, 1970, at various other places in Duval County, Florida, said BEVERLY JANE WINN solicited and encouraged one Sharon Lamson Shoaf, then a minor aged 17 years, to engage in immoral acts contrary to the statutes of the state of Florida; and at all times and places the said BEVERLY JANE WINN knew that the said Sharon Lamson Shoaf was admitted to the Grant Haven Hospital for reasons of emotional instability. The second count charged BEVERLY JANE WINN with administering or procuring various prescription drugs including but not limited to Thorazine and Dilantin, knowing that said drugs had not been prescribed by Sharon Lamson Shoaf's physician. *(Exhibit 1).* After filing an Answer of not guilty in all respects *(Exhibit 2),* and testimony being taken, the Board entered its Order on June 13, 1972, finding BEVERLY JANE WINN guilty of unprofessional and immoral conduct, and suspended her license for two (2) years. *(Exhibit 3).*

Thereafter, Petition for Certiorari was filed in the District Court of Appeals, First District of Florida, *(Exhibit 4)* alleg-

ing, among other things, that the said Statute 464.21(1)(b) was unconstitutional. The District Court of Appeals entered its opinion on January 23, 1973, in words as follows:

"PER CURIAM Petition for Writ of Certiorari Denied *(Exhibit 5)*.

Petition for Rehearing was filed by the Petitioner herein on February 5, 1973, *(Exhibit 6)* and the said District Court of Appeals did enter its Order on February 27, 1973, denying said Petition *(Exhibit 7)*.

7. On Petition to the First District Court of Appeals for Writ of Certiorari, numerous points were raised, including the following:

> Are the charges of immoral and unprofessional conduct so vague and ambiguous that one must guess at its meaning and differ as to its application which vio lates due process of law under the Constitutions of the State of Florida and United States?

The District Court of Appeals in its opinion, in effect, stated "no."

This point of law is involved in and decided by the Supremt Court of Florida and United States Supreme Court in the following cases:

> Locklin v. Pridgeon, Fla. 30 So.2 102
> Franklin v. State, 257 So.2 21
> State v. Barquet, Fla., 262 So.2 431
> Papachristou, et al. v. City of Jax.
> ..... US ....., 31 L Ed 2d 110, 92 S Ct.
> Gooding v. Wilson, 92 S.Ct. 1103, P. 19

Copies of the above decisions are attached as Exhibits 8 through 12.

In *Locklin v. Pridgeon*, Fla. 30 So.2 102, which was based upon the language of the statute, it is stated: "it shall be unlawful for any person to commit any act under color of authority as an officer, agent, employee of the United States government, state of Florida, or any political subdivision thereof, when such act is not authorized by law." The Florida Supreme Court, in reversing, held that the infirmity of the statute was too vague, indefinite and uncertain to constitute notice of crime or crimes of unlawful act which it purports to prohibit. It described no ascertainable standard of guilt and left it up to a ministerial officer to determine to which the statute is to be applied and creates an unwarranted and void delegation of legislative power. *(Exhibit 8)*

In *Franklin v. State and Joyce v. State*, Florida, there was a conviction under a statute which reads as follows: "Whoever commits the abominable and detestable crime against nature, either with mankind or with beast shall be punished by imprisonment in the state prison not exceeding 20 years." The Court said a very serious question is raised as to whether the statute meets the recognized constitutional test that it inform the average person of common intelligence as to what is prohibited so that he need not speculate as to statutory meaning. It was further held that it is further authoritatively recognized that the statute provides a penalty for a crime but fails to delineate what conduct will violate its terms. *(Exhibit 9)*

In *State v. Barquet*, defendants were charged with violation of abortion statutes in criminal court of record in Dade County which declared the statute unconstitutional and the state appealed. The Supreme Court held that the abortion statute prohibiting abortions except "those necessary to preserve the life of such mother" was unconstitutionally vague.

The Court went on to say that if a statute omits certain necessary and essential provisions which serve to impress the acts committed as being wrongful and criminal, the Courts cannot supply deficiencies or undertake to make the statute definite and certain, because to do so would be to perform a lawmaking function. That in order to recognize constitutional tests, it must inform the average person of common intelligence as to what is prohibited so that he may not speculate as to statutory meaning. *(Exhibit 10)*

In *Papachristou v. City of Jacksonville*, eight defendants were convicted in the Jacksonville, Florida, municipal Court of violating the Jacksonville vagrancy ordinance which levied criminal penalties on 15 different types of violations. District Court of Appeal, First District, dismissed Petition for Writ of Certiorari in which the Florida Circuit Court had affirmed the conviction. On certiorari to the United States Supreme Court, it was reversed. It was held that the Jacksonville ordinance was void for vagueness, both in the sense that it failed to give a person of ordinary intelligence fair notice that his contemplated conduct was forbidden by ordinance, and because it encouraged arbitrary and eratic arrests and convictions. *(Exhibit 11)*

In *Gooding v. Wilson*, this was a case involving a habeas corpus proceeding by a state prisoner to set aside his conviction under a Georgia statute on the grounds that the statute was unconstitutional. United States Supreme Court held that the Georgia statute which provided that "any person who shall, without provocation, use to or of another, and in his presence . . . . approbrious words or abusive language tending to cause a breach of the peace . . . . shall be guilty of a misdemeanor and which had not been narrowed by the Georgia courts to apply only to "fighting words" which by

their very utterance . . . tend to incite an immediate breach of the peace, "was on its face unconstitutionally vague and overbroad." *(Exhibit 12)*

The decision of the District Court of Appeal, First District, which Petitioner seeks to have reviewed is in direct conflict with the above mentioned decisions of the Supreme Court of Florida and the United States Supreme Court. Because of the reasos and authorities set forth herein, and enlarged in the Petitioner's Brief, it is believed that the decision hereby sought to be reviewed is erroneous and that the conflicting decisions of the Supreme Court of Florida and the United States Supreme Court are correct and should be approved by this Court as the controlling law for the State of Florida.

WHEREFORE, Petitioner requests this Court to grant a Writ of Certiorari and enter its Order quashing the decision and Order hereby sought to be reviewed, approving the supra decisions of the Supreme Court of Florida and the United States Supreme Court as the correct decisions, and granting such other and further relief as shall seem right and proper to the Court.

STEPHEN H. DAVIS and
P. DONALD DeHOFF

By .....

Attorneys for Petitioner
802 Barnett Bank Building
Jacksonville, Florida 32202

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing has been furnished District Court of Appeals, First District, Tallahassee, Florida, and to Albert S. C. Millar, Jr., 1233 King Street, Jack-

sonville, Florida, attorney for Florida State Board of Nursing, by United States Mail, this ..... day of March, 1973.

.....

Attorney

"APPENDIX 10"

"ORDER OF THE SUPREME COURT OF FLORIDA"

SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1973

TUESDAY, APRIL 24, 1973

Case No. 43,476

DISTRICT COURT OF APPEAL, FIRST DISTRICT

BEVERLY JANE WINN,

Petitioner,

vs.

FLORIDA STATE BOARD OF NURSING,

Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that

the Petition for Writ of Certiorari be and the same is hereby denied.

CARLTON, C.J., ROBERTS, ERVIN, ADKINS and DEKLE, J.J., concur

CC: Hon. Raymond E. Rhodes, Clerk

Hon. Stephen H. Davis;
Hon. P. Donald DeHoff
Hon. Albert S. C. Millar, Jr.

A True Copy
TEST:
(SEAL)

Sid J. White
Clerk Supreme Court.
By Kay D. Yert, P. C.

"APPENDIX 11"

"PETITION FOR RE-HEARING TO SUPREME COURT"

SUPREME COURT OF FLORIDA

January Term

Case No. 43,476

District Court of Appeal, First District

BEVERLY JANE WINN,

Petitioner,

-v-

FLORIDA STATE BOARD OF NURSING,

Respondent.

PETITION FOR RE-HEARING

The Petitioner herein, BEVERLY JANE WINN, by and through her undersigned attorneys, petitions the Court for re-hearing on the following:

The Court in its Order of April 24, 1973, denied her Petition for Writ of Certiorari on grounds ". . . . it appearing to the Courtthat it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied." This is rather hard to comprehend inasmuch as Florida Appellate Rule 4.5c(6) under the heading *From District Court to Supreme Court,* states in part "Where any decision of a district court of appeal . . . . . or (3) is in direct conflict with a decision of . . . . . the Supreme Court on the same point of law, petition may be filed with the Supreme

Court to issue a writ of certiorari to review such decision." The record in this court shows that there is a constitutional question being raised and the decision of the District Court, First District, is in direct conflict with the Supreme Court's ruling on the same point of law. Instead of again citing said cases, we call the same to the Court's attention. Said cases cited in our Brief.

STEPHEN H. DAVIS and
P. DONALD DeHOFF

By: /s/ P. DONALD DeHOFF
Attorneys for Petitioner
802 Barnett Bank Building
Jacksoville, Florida 32202

I HEREBY CERTIFY that copy of the foregoing Petition for Re-Hearing has been furnished, District Court of Appeal, First District, Tallahassee, Florida, and to Albert S. C. Millar, Jr., Esquire, 1233 King Street, Jacksonville, Florida, Attorney for Florida State Board of Nursing, and to Florida State Board of Nursing, 1244 Beach Boulevard, Jacksonville, Florida, by United States Mail, this 30th day of April, 1973.

/s/ P. DONALD DeHOFF
Attorney

"APPENDIX 12"

"FLORIDA SUPREME COURT DENIAL OF PETITION FOR RE-HEARING"

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1973

FRIDAY, JUNE 8, 1973

Case No. 43,476

BEVERLY JANE WINN,

Petitioner,

vs.

FLORIDA STATE BOARD OF NURSING,

Respondent.

On consideration of the petition for rehearing filed by attorneys for petitioner,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

CARLTON, C.J., ROBERTS, ERVIN, ADKINS and DEKLE, J.J., concur

A True Copy
TEST:
(COURT SEAL)
Sid J. White
Clerk Supreme Court.
By: Kay L. Yert, P. C.

CC: Messrs. Stephen H. Davis and P. Donald DeHoff
Hon. Albert S. C. Millar, Jr.
Hon. Raymond E. Rhodes, Clerk

(THE ORDER OF APRIL 24, 1973 HAS BEEN MAILED TO THE CLERK OF THE FIRST DISTRICT COURT OF APPEAL.)

"APPENDIX 13"

"PETITION FOR STAY IN SUPREME COURT"

IN THE SUPREME COURT OF FLORIDA

Case No. 43,476

BEVERLY JANE WINN,

Petitioner,

-vs-

FLORIDA STATE BOARD OF NURSING,

Respondent.

PETITION FOR STAY PENDING REVIEW TO UNITED STATES SUPREME COURT

Petitioner received copy of an Order in the above styled cause denying Petition for Re-hearing, dated Friday, June 8, 1973; at the bottom of said Order is typed "The order of April 24, 1973 has been mailed to the clerk of the First District Court of Appeal." Petitioner would state to the Court that she has been awaiting Court's ruling on her Petition for Re-hearing and is in the process of filing a Petition for Certiorari in the United States Supreme Court. Under Rule 27 of the Rules of the said Supreme Court, an application for a stay must be made to a Judge of the Court rendering the decision sought to be reviewed or to such court is same is denied. The application must be made pursuant to 28 U.S.C. section 2101(f) to a Justice of the Supreme Court for application for such a stay.

WHEREFORE, Petitioner prays that the Court will recall in said Order which was mailed to Clerk of the First District

Court of Appeals and to enter its Order staying further proceeding until passed upon by the United Supreme Court.

STEPHEN H. DAVIS and P. DONALD DeHOFF

By: .....

Attorneys for Petitioner
802 Barnett Bank Buildig
Jacksonville, Florida 32202

I hereby certify that copy of the foregoing has been furnished Albert S. C. Millar, Jr., Esquire, 1233 King Street, Jacksonville, Florida, attorney for Florida State Board of Nursing. by United States Mail, this 11th day of June, 1973.

.....

ATTORNEY

"APPENDIX 14"

"ORDER GRANTING TEN DAY STAY"

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1973

WEDNESDAY, JUNE 13, 1973

Case No. 43,476

BEVERLY JANE WINN,

Petitioner,

-vs-

FLORIDA STATE BOARD OF NURSING,

Respondent.

Petitioner has filed petition for stay of proceedings and upon consideration thereof, said petition is granted and proceedings in this Court are stayed and further proceedings in the District Court of Appeal, First District, and before the Florida State Board of Nursing, are hereby stayed to and including June 25, 1973, to enable petitioner to seek review in the Supreme Court of the United States.

The Court does not feel that a stay is justified but in order to give the petitioner an opportunity to apply to the Supreme Court of the United States for relief, a temporary stay of ten days is granted but no further stay will be allowed in this Court.

A true copy
TEST:

Sid J. White
Clerk Supreme Court
(Court Seal)

By: Bernice L. Saunders
Chief Deputy Clerk

cc: Clerk, First District Court of Appeal
Hon. P. Donald DeHoff
Hon. Albert S. C. Millar, Jr.

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SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
OCT 18 1973
MICHAEL RODAK, JR., CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-146

BEVERLY JANE WINN,

Petitioner,

-vs-

FLORIDA STATE BOARD OF NURSING,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

JULIUS FINECOLD
218 East Forsyth Street
Jacksonville, Florida 32202
Attorney for Respondent

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In The
Supreme Court of the United States

OCTOBER TERM, 1973

No.

BEVERLY JANE WINN,

Petitioner,

-vs-

FLORIDA STATE BOARD OF NURSING,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

STATUTE INVOLVED

Florida Statute 464.21(1)(b) as set out in Petitioner's brief in Appendix 1.

QUESTION PRESENTED

Respondent adopts the question presented in Petitioner's brief as it appears on page two.

STATEMENT OF THE CASE

Respondent adopts the statement of the case presented in Petitioner's brief as it appears on Pages two and three.

REASONS FOR DENYING WRIT

I

LACK OF JURISDICTION OF THE SUPREME COURT DUE TO FAILURE OF PETITIONER TO PROPERLY RAISE A SPECIFIC FEDERAL QUESTION IN THE STATE COURT AS REQUIRED BY SUPREME COURT RULE 23(1)(f) and 28 USC 1257(3).

In cases coming to the U.S. Supreme Court from a state court, the only issues which are subject to review by the Supreme Court are those which were presented to the state court. As said by the Supreme Court in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 334--this is jurisdictional.

Furthermore, when the question is raised in the state court it must be raised with particularity and cannot be left to conjecture, speculation or inference. As the court stated in *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 "the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

Likewise, Rule 23(1)(f), Supreme Court Rules states "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceed-

ings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g. by a pleading, by request to charge, and exceptions, by assignment of error); and the way in way they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g. ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show the federal question was *timely and properly* raised (emphasis supplied) so as to give this court jurisdiction to review the judgment on writ of certiorari."

In addition Title 28 USC 1257(3) limits the jurisdiction of the Supreme Court to review the final judgment or decree by the highest court of a state by writ of certiorari as follows: "Where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is *specifically set up or claimed under the Constitution*, (emphasis supplied), treaties or statutes of a commission held or authority exercised under the United States."

A careful reading of Petitioner's brief, including the appendix fails to reveal where any federal question has been raised with the necessary particularity. Petitioner on Page two of his brief under "Question Presented" does ask whether the language of Florida Statute 464.21(1)(b) is sufficiently definite to meet the minimum requirements of "due process." Does this satisfy the requirement that Petitioner specifically set up the federal question involved in the state court? It is submitted that it does not.

In *Bowe v. Scott*, 233 U.S. 658, at page 664 and 665, appellant in invoking the jurisdiction of the Supreme Court averred in the state court "That the ordinance is an attempt to take from your complainants whose property adjoins and abuts upon the said alley their rights in and to said alley *without due process of law*" (emphasis supplied). The court held that such an averment was insufficient to invoke the jurisdiction of the U.S. Supreme Court saying "But it is settled that such an averment making no reference to the Constitution of the United States and asserting no express rights thereunder is solely referable to the state court, which in this instance has a due process clause, and affords *no basis whatsoever for invoking the jurisdiction of this court*" (emphasis supplied).

Article 1 Section 9 of the Florida Constitution contains the due process clause of said constitution. It states "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense or be compelled in any criminal matter to be a witness against himself."

It is submitted that once a case reaches the U.S. Supreme Court, review is limited to the specific federal question that was properly raised in the state court. *Whitney v. California*, 274 U.S. 357, 362-3; *Wilson v. Cook*, 327 U.S. 474, 483-4. As the court said in *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434-435 "In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on

grounds not properly presented, due regard for the appropriate relationship of this court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this court, where the constitutionality of a statute has been upheld in the state court consistently refuses to consider any grounds of attack not raised or decided in that court." Petitioner is at this point of time, furthermore, precluded from urging a federal issue that was not raised or decided below even though such issue might have been raised. *Safeway Stores v. Oklahome Grocers*, 360 U.S. 334, 342 n.7; *Cardinale v. Louisiana*, 394 U.S. 437, 438.

II

THE STATUTE IN QUESTION IS NOT VAGUE AND INDEFINITE.

All the cases relied upon by Petitioner in his brief to substantiate his position that Florida Statute 464.21(1)(b) is vague and indefinite are criminal statutes which by their very nature must be strictly construed. The statute in question is not a criminal statute but rather a regulatory one.

In *Knight v. Louisiana State Board of Medical Examiners*, 211 So.2d 433 the appellant attacked Louisiana's Medical Practice statute as being too vague and indefinite. The Louisiana Supreme Court disagreed, saying "It is a regulatory provision enacted by the legislature to insure that the medical profession in this state will meet certain standards of conduct commensurate with the needs of the general welfare of its people. The penalty for failure to do so is not imprisonment, one who violates the standards of ethical practice simply may lose his right to practice medicine either temporarily or permanently."

The same approach was taken by the Florida Court in *State ex rel. Degaetani v. Driskell et al. State Board of Medical Examiners,* 139 Fla. 49, 190 So. 461, which inter alia the appellant in his petition for a writ of certiorari to review an order of the State Board of Medicine revoking his license complained of the fact that he was not accorded a jury trial. The Florida Supreme Court speaking through its Chief Justice said "It is not out of place to state, however, that this is not such a case as entitled appellant to a trial by jury. It is not a criminal prosecution and the Circuit Court acts only as a reviewing court."

The language used in the statute in question is similar to that used in most of our sister states and although attacked in other states on similar grounds of being vague and indefinite, the courts have overwhelmingly held such statutes not to be void for want of certainty and definiteness.

As stated in 70 Corpus Juris Secundum 877 "The most common statutory grounds for revocation or suspension of the license or certificate of a physician, dentist or chiropractor are unprofessional, dishonorable or immoral conduct. Similar grounds prescribed by the statutes of some jurisdictions are gross immorality, malpractice, gross violation of professional duties, gross misconduct in the practice of the profession, gross carelessness, or manifest incapacity and grossly unprofessional conduct of a character likely to deceive or defraud the public. The subject matter of statutes prescribing such grounds is within the police power and, except in a few instances, the statutes are held *not to be void for uncertainty and indefiniteness;* (emphasis supplied) the legislature is not required to define with particularity the acts which constitute unprofessional conduct. The board, under such a provision, has power in the first instance to decide

what acts constitute unprofessional conduct, subject to judicial interference only in the abuse of such power, but the board is not required to prescribe by regulation what those acts shall be; . . . . . Generally speaking, apart from or in the absence of, statutory definitions, what constitutes unprofessional conduct or gross immorality must be determined by those standards which are commonly accepted by those practicing the same profession in the same territory. In determining what constitutes dishonorable conduct every case must be determined on its own particular facts."

In *Dilbiard v. State Medical Examiners*, 69 Colo. 575, 196 Pac. 866 the Colorado court held that the phrase "immoral, unprofessional or dishonorable" in a statute characterizing conduct for which the Board of Medical Examiners might revoke a physician's license was not subject to the objection of indefiniteness and uncertainty. The court said "We must conclude that the words 'immoral, unprofessional or dishonorable' are sufficiently definite and that the board has jurisdiction to determine what constitutes unprofessional and dishonorable conduct and to revoke a license on account of such conduct." The court also pointed out that "although the Medical Board has the power to decide in the first instance what constitutes unprofessional conduct, yet if it abuses that power, as counsel fears it will, the courts may review its decision and reverse it."

In *Bell v. University of New York*, 295 N.Y. 101, 65 N.E. 2d 184, a dentist's license to practice dentistry was suspended for one year after a determination by the State Board of Dental Examiners that the petitioner was guilty of unprofessional conduct. The New York court in affirming the determination of the Board of Regents' decision that the Petitioner was guilty of unprofessional conduct said that "It has

never been necessary for the Legislature or the Board of Regents to define with particularity acts which would constitute unprofessional conduct, whether in the field of dentistry or pharmacy." The court went on to quote with approval from *In Matter of Cherry*, 289 N.Y. at page 158, 44 N.E. 2d at page 411, "What constitutes unprofessional conduct by a dentist must be determined by those standards which are commonly accepted by those practicing the same profession in the same territory. The law is a very ancient profession and certain forms of conduct have been banned as unprofessional for centuries in both England and America. Ancient traditions have created rigid bans and by common consent those who violate those bans should be excluded from the goodly company of the members of the bar. At least in part these bans have been formulated in Canons of Ethics adopted and enforced by associations of members of the bar. In the profession of the law no person can plead ignorance as palliation for professional misconduct. In vocations, like dentistry, more recently accepted as professions, professional standards are perhaps less uniform, less well understood, and less rigidly defined. Nevertheless, the standards of conduct generally accepted by practitioners in the State of New York are not so indefinite that they cannot be determined by qualified persons. They are part of the ethics of the profession and 'what is generally called the "ethics" of the profession is but the consensus of expert opinion as to the necessity of such standards.' *Semler v. Oregon State Board of Dental Examiners, supra*, 294 US (608 at) page 612. 55 S Ct. (570. at) page 572.79 L ed 1086. Every member of the profession should be regarded as an expert for such purpose. There is a moral dereliction in failure by any member of a profession to apply in professional practice the standards which, by consensus of opinion in the profession, are necessary."

CONCLUSION

In view of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing Brief of Respondent in Opposition has been furnished The Supreme Court of Florida, Tallahassee, Florida, Florida District Court of Appeal, First District, Tallahassee, Florida, and to Stephen H. Davis and P. Donald DeHoff, 802 Barnett Bank Building, Jacksonville, Florida 32202, Attorneys for Petitioner, by United States Mail, this ..... day of October, 1973.

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Attorney